

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



November 15, 2002

Agenda ID #1379

TO: PARTIES OF RECORD IN INVESTIGATION 92-01-002

This is the draft decision of Administrative Law Judge (ALJ) McKenzie. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

CAROL A. BROWN

Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:tcg

Attachment

Decision **DRAFT DECISION OF ALJ MCKENZIE** (Mailed 11/15/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into all facilities-based cellular carriers and their practices, operations and conduct in connection with their siting of towers, and compliance with the Commission's General Order No. 159.

Investigation 92-01-002
(Filed January 10, 1992)

FINAL DECISION CLOSING PROCEEDING

This decision closes this docket, which is nearly 11 years old and has been inactive for some time. As indicated below, no party (including the Commission staff responsible for the investigation) objects to this course of action.

Background

The General Order (GO) with which this investigation is concerned, GO 159, was promulgated in Decision (D.) 90-03-080 and took effect on March 28, 1990. Under the "Standard Review Procedure" of GO 159 that was in effect until the general order was amended in 1996, once a cellular carrier had received a certificate of public convenience and necessity for its initial system,¹

¹ Under the Omnibus Budget Reconciliation Act of 1993, this Commission lost jurisdiction to issue certificates of public convenience and necessity to providers of wireless telecommunications services. The 1993 Act also preempted our authority to engage in rate regulation of commercial mobile radio service providers. However, the *siting* of wireless facilities was one of the "terms and conditions" reserved to the States under the 1993 Budget Act.

responsibility for environmental review of proposed new sites shifted from this Commission to the local agency (or agencies) having jurisdiction over the site. After these agencies had issued the necessary permits, the carrier filed an advice letter (AL) with the Commission stating that it had all the necessary permits in hand and had complied with all applicable regulations and wished to begin construction. The carrier was free to begin construction once we had issued a resolution approving the AL. In the alternative, the carrier was free to begin construction after filing the AL but prior to Commission approval, provided the carrier had filed a letter of undertaking stating that it would remove the new facility in the event the AL was disapproved.

The Order Instituting Investigation (OII) that commenced this proceeding alleged that, in many cases, the requirements of GO 159 had not been complied with. The OII stated:

“CACD staff have identified three cellular utilities which it believes have had a pattern of constructing their cellular towers prior to filing an AL with the Commission. Furthermore, in a number of cases, where sites were constructed prior to and during the AL process, the required undertakings were not provided. None of these companies informed the Commission that the sites had in fact been constructed prematurely until Commission staff began to directly question the companies. Therefore, the staff believes that some of the AL filings have misrepresented the status of the cellular sites.” (OII, p. 3.)

In order to investigate this situation, the Commission made all of the facilities-based cellular carriers respondents in the proceeding and ordered them to make two sets of filings. The first filing required paperwork for any construction a carrier had ever undertaken on any site; the second required paperwork for sites on which an AL was pending on the date of issuance of the

OII, but as to which construction had begun prematurely. In the Spring of 1992, the respondent carriers made the required filings.

After several months of reviewing the filings, the Advocacy Staff of the Commission Advisory and Compliance Division (CACDA)² issued an Interim Status Report (ISR) on November 25, 1992. The ISR listed on a site-by-site basis CACDA's allegations about probable GO 159 violations committed by various carriers. Pursuant to a ruling issued by the assigned Administrative Law Judge (ALJ), several carriers submitted responses to the ISR on February 17, 1993. These carriers also participated in a prehearing conference (PHC) intended, among other things, to find ways of narrowing the very substantial gap that existed between CACDA and the carriers over how certain provisions of GO 159 should be interpreted.

At the Commission's April 7, 1993 meeting, a new phase of the OII began. On that date, the Commission issued six Orders to Show Cause (OSCs) why four of the respondent carriers should not be found to have violated GO 159 with respect to their activities at six specific sites. In D.94-11-018, as modified by D.94-12-007, the Commission issued its findings and conclusions with respect to the sites covered by the OSCs.³

² CACDA was the first entity within the Commission to represent the staff in connection with this investigation. In June 1995, the Safety and Enforcement Division (S&E) assumed responsibility for the investigation. In the Fall of 1996, the Consumer Services Division (CSD, now known as the Consumer Protection and Safety Division) succeeded to S&E's responsibilities for conducting the investigation. In this ruling, references will be to the staff entity that took action on a particular date.

³ One of the respondents in the OSCs, GTE Mobilnet, applied for rehearing of D.94-11-018. Rehearing was denied in D.97-12-115, 78 CPUC2d 212 (1997).

The Commission has also approved three settlement agreements in connection with this investigation. In D.93-09-075, 51 CPUC2d 20 (1993), the Commission approved a settlement between McCaw Cellular Communications, Inc. (McCaw) and CACDA under which McCaw agreed to pay \$145,000 over a three-year period. In D.94-11-019, 57 CPUC2d 250 (1994), the Commission approved a substantially more complex settlement agreement between CACDA and the Los Angeles Cellular Telephone Company (LACTC) under which LACTC agreed to (1) pay \$4.37 million over a three-year period, (2) submit to an audit of its GO 159 compliance with respect to all of the sites covered by this investigation, and (3) either cure or tear down facilities found not to comply. Finally, in D.97-12-083, 77 CPUC2d 390 (1997), the Commission approved a settlement between GTE Mobilnet Incorporated (GTEM) and CSD pursuant to which GTEM agreed to pay \$800,000, submit to an audit of its GO 159 compliance by an independent consultant, and cure any deficiencies found in the audit.

Discussion

In the nearly five years since the GTEM settlement (D.97-12-083) and rehearing (D.97-12-115) decisions were issued, there has been no further activity in this docket. Not only have further settlements not been submitted for our consideration, but there has been a great deal of consolidation within the cellular industry.

Moreover, the provisions in GO 159 that originally gave rise to this investigation are no longer in effect. In D.96-05-035, 66 CPUC2d 257 (1996), the Commission adopted amendments to GO 159 that left the issue of whether necessary permits had been obtained to local permitting authorities, did away with the requirement that cellular carriers obtain a Commission resolution before commencing construction, and adopted an arbitrator's role for the Commission in the event of conflict between a carrier and local authorities. Since the adoption of

these amendments (which were promulgated as GO 159-A), there have been few disputes about the adequacy of the permitting for new cellular facilities.

On September 27, 2002, the assigned ALJ issued a ruling setting forth the procedural history above and expressing the opinion that since this docket appeared to have served its original purpose, it should be closed. Parties with a contrary viewpoint were invited to file comments no later than October 15, 2002 setting forth their reasons for keeping the docket open. No comments were filed in response to this invitation.

In light of the procedural history set forth above and the lack of opposition to terminating this proceeding, we agree with the assigned ALJ that this docket should now be closed.

Comments on Draft Decision

The draft decision of the administrative law judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

Assignment of Proceeding

Henry M. Duque is the Assigned Commissioner, and A. Kirk McKenzie is the assigned ALJ in this proceeding.

Findings of Fact

1. This investigation was commenced in January of 1992 because of the Commission's perception that several facilities-based cellular carriers had engaged in repeated violations of GO 159.
2. On November 25, 1992, CACDA issued an ISR, which set forth on a site-by-site basis the violations of GO 159 that staff believed had occurred.

3. On February 17, 1993, several of the respondent carriers submitted responses to the ISR.
4. On April 7, 1993, the Commission issued six OSCs directing four of the respondent carriers to show cause why they should not be found to have violated GO 159 with respect to six specific sites.
5. The allegations concerning the six sites covered by the OSCs were resolved in D.94-11-018, as modified by D.94-12-007. Rehearing of D.94-11-018 as modified was denied in D.97-12-115.
6. The Commission has approved settlements agreements concerning the allegations in this investigation with McCaw in D.93-09-075, with LACTC in D.94-11-019, and with GTEM in D.97-12-083.
7. Since the issuance of D.97-12-083 and D.97-12-115, there has been no further activity in this docket.
8. In the period since D.97-12-083 and D.97-12-115 were issued, there has been a great deal of consolidation within the cellular industry.
9. GO 159 was substantially amended in D.96-05-035, and as amended was reissued as GO 159-A.
10. Since the promulgation of GO 159-A, there have been few disputes about the adequacy of permitting for new cellular facilities.

Conclusion of Law

1. This proceeding should be closed.

O R D E R

IT IS ORDERED that Investigation 92-01-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.